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Supreme Court, U.S.
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No. _____.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

ROWE INDUSTRIES, INC.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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February 25, 1991

QUESTIONS PRESENTED FOR REVIEW

1. Whether a conflict with other reviewing courts is created by a decision by the Federal Circuit that citizens contracting with the United States are bound by the Government's "expectations" which are not expressed in the terms of the contract?

2. Whether a decision by the Federal Circuit allowing the elimination of an unwanted contract by a default termination conflicts with the decisions of other reviewing courts?

3. Whether the majority opinions erred as a matter of law in failing to recognize a legal presumption that once a party has presented a prima facie case that the materials tendered met contract requirements the burden falls upon the opposing party to overcome the presumption?

4. Whether an affirmative defense or avoidance based on a course of dealing may serve as the basis for sustaining a party's position if that party did not plead course of dealing and expressly waived the defense?

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REPORTS OF OPINIONS BELOW

The opinion for the United States Court of Appeals for the Federal Circuit, Rowe Industries, Inc. v. United States, 918 F.2d 186 (Fed. Cir. 1990), appears in the Appendix hereto. The opinion of the Armed Services Board of Contract Appeals, Rowe Industries, Inc., ASBCA Nos. 31875, 31876, 33661, 33662, 89-3 BCA (CCH) ¶ 22,155, also appears in the Appendix hereto.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on October 5, 1990, affirming the decision rendered by the Armed Services Board of Contract Appeals in Case Numbers 31875, 31876, 33661, and 33662 on November 27, 1989. The Court of Appeals for the Federal Circuit denied a timely petition for rehearing on November 27, 1990, and subsequently, denied a suggestion for rehearing in banc on December 7, 1990. This petition for certiorari was timely filed within ninety (90) days of

November 27, 1990, the date the petition for rehearing below was denied. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS

I. ARMED SERVICES PROCUREMENT REGULATIONS-- [Pursuant to this Court's Rule 14(f), see attached Appendix].

II. FEDERAL RULES OF CIVIL PROCEDURE RULE 8(C) [Pursuant to this Court's Rule 14(f), see attached Appendix].

STATEMENT OF THE CASE

Petitioner, Rowe Industries, Inc.[1] ("Rowe"), timely tendered the required quantity of cable assemblies for delivery under two contracts with the Respondent, the United States, but the United States refused to inspect and accept the assemblies and terminated the contracts for default after allowing the original

[1]Pursuant to Rule 14.1(b) of this Court, all the parties to this proceeding appear in the caption of the case. As required by Rule 29.1 of the Court, the parent company of Rowe Industries, Inc. is Talley Industries, Inc., a Delaware Corporation, located in Phoenix, AZ. Rowe Industries, Inc. has no subsidiaries.

delivery schedules to lapse. The alleged ground for the termination was a failure to deliver cable assemblies using a brand name material, "Okoflex", for the cable insulation. The Government admitted that neither the contracts nor any Government drawing nor any specification required the use of only "Okoflex" insulation; and the Government admitted that the manufacturer of "Okoflex" had certified that "Okoflex" was no longer manufactured and EPR insulated cable was equal to or better than "Okoflex" insulated cable. Consequently, Rowe was left with the full quantity of cable assemblies required for both contracts.

Rowe appealed to the Armed Services Board of Contract Appeals, pursuant to the jurisdiction granted the Board under the Contract Disputes Act of 1978, 41 U.S.C. 607(d), from the default termination final decisions. The Board denied Rowe's appeals and, again pursuant to the

Contract Disputes Act, 41 U.S.C. 609(b) and (c), Rowe appealed to the United States Court of Appeals for the Federal Circuit, the court of first instance in this case. On October 5, 1990, by a split decision of the three member panel of the Federal Circuit, with each member writing a separate opinion, the Board decision was affirmed. By the same 2-1 margin, on November 27, 1990, the Federal Circuit denied Rowe's petition for rehearing.

The plurality decision below conflicts with precedent by requiring that citizens contracting with the Federal Government comply with expressed "expectations" for contract performance rather than with the requirements specifically included in the contract. This petition has been brought to resolve this important issue raised by the plurality panel decision and instill a uniform application of governing

standards in this exclusive federal arena of public contract law.

For purposes of this Petition, Rowe sets forth the following undisputed findings of fact made by both District Judge Brown, sitting by designation, in the main opinion of the Federal Circuit and Senior Circuit Judge Cowen in the dissenting opinion --

On November 16, 1983, the Air Force, acting through its Oklahoma City Air Force Logistics Center ("OCAMA"), awarded to Rowe Contract No. F34601-84-C-0053. The contract required Rowe to supply by January, 1985 80 electrical bundles for use in the B-52 bomb navigation radar system. [Brown, D.J., Opinion, p. 2].

On May 7, 1984, OCAMA awarded a second contract, No. F34601-84-C-1576, to Rowe for seventy-one more electrical bundles to be delivered by June, 1985. [Brown, D.J., Opinion, p. 2].

The requirements of the contracts concerning cable insulation were incorporated by reference. The contracts expressly required that Rowe provide the items described in Rowe's drawing of part number 4R1044. Rowe's drawing 4R1044 further designated Part Number R1035-1 as the cable to be used in the assemblies. Rowe's drawing for Part Number R1035-1 specified merely the use of "Okoflex Insulation or Equivalent." [Brown, D.J., Opinion, p. 2-3].

The cable for the assemblies, including the "Okoflex" insulation, was produced by Okonite Company ("Okonite"). Rowe had used "Okoflex" insulation in the bundles delivered under all prior contracts since 1975. Okonite was the sole supplier of "Okoflex" insulation. [Brown, D.J., Opinion, p. 3].

On May 16, 1984, after the contracts had been executed, the Okonite Company advised Rowe that the manufacture of "Okoflex" had been

discontinued and that ethylene/propylene rubber ("EPR") was being used for the insulation in the cables. At that time, Okonite certified that the EPR insulated cable had been fully tested and met all the applicable requirements for the two contracts at issue herein. However, the government's inspector refused further inspections of Rowe's cables containing the new insulation until after Rowe had submitted documentation that the new material met or exceeded the contract requirements for "Okoflex or its equivalent." As a result of that action and the government's subsequent delay, Rowe was prohibited from making any deliveries until after the expiration of the delivery deadlines. [Cowen, S.C.J., Opinion, p. 3].

Because of the refusal to inspect, on October 9, 1984, Rowe submitted to the procuring agency a proposal requesting approval of cables insulated with EPR rather than "Okoflex". Rowe

attached the results of a functional test of the cables with the new material and a statement that the substitute was equal to or better than "Okoflex", which was no longer available. The Government's inspector approved the proposal with a comment that the cable with "Okoflex" was no longer available, but that the new material was a better material in all respects and would benefit the government by extending the life of the cable assemblies. [Cowen, S.C.J., Opinion, p. 3-4].

On December 14, 1984, Mr. Ayers, an engineer with the Defense Logistics Agency, issued a memorandum stating that he had reviewed the VECP for technical adequacy, gross effect on cost, and other factors. He also stated that he had sufficient test data to show that a cable using the EPR insulation was equal to or better than the "Okoflex" cable. He then recommended that the contracting officer approve the VECP as

soon as possible. On December 18, 1984, the administrative contracting officer forwarded the VECP and supporting data, along with Mr. Ayers' memorandum of December 14, 1984, to the procuring agency. His forwarding document stated that he had reviewed Mr. Ayers' technical report and concurred in the findings set forth therein. He requested a prompt decision on the VECP. [Cowen, S.C.J., Opinion, p. 4].

On December 19, 1984, Rowe requested that the time for making deliveries under the contract be extended for a period of eight weeks after approval of the VECP. The extension was not granted. On April 3, 1985, almost six months after the VECP had been submitted, the government notified Rowe that the VECP had been disapproved. [Cowen, S.C.J., Opinion, p. 4-5].

On July 10, 1985, the termination contracting officer terminated Rowe's contracts for default. The termination was based on the fact

that deliveries had not been made by the due date of the second contract, June, 1985. [Cowen, S.C.J., Opinion, p. 5].

The parties have stipulated that at no time after December 19, 1984, did any representative of the government make an attempt to determine whether the properties, characteristics, form, fit, and function of the EPR insulation were equal to or better than those of "Okoflex" insulation. The parties have also stipulated that at no time after December 19, 1984, did any representative of the government make an attempt to determine whether "Okoflex" insulation was commercially available for use on the two contracts. [Cowen, S.C.J., Opinion, p. 5].

Further, on January 14, 1982, the Air Force had issued a modification which deleted the cable assembly using the "Okoflex" insulation for further use on B-52 aircraft and substituted a new system. The Government has admitted that

at no time before the award of the two contracts or thereafter to June, 1985, did the Government inform or advise Rowe that the cable assembly insulated with "Okoflex" was obsolete or was no longer needed or used for its intended purpose in the radar systems of B-52 aircraft. There is no evidence in the record that the cable assemblies ordered from Rowe had any possible use by the Air Force except in the radar system of the B-52 aircraft. [Brown, D.J., Opinion, p.4; Cowen, S.C.J., Opinion, p. 7].

On February 26, 1985, James R. Brakebill, Deputy Chief, Item Management Division, Directorate Material Management of the procuring agency, had issued an internal memorandum which was not communicated to Rowe. First, Mr. Brakebill noted that the 1982 modification had removed the cable to be supplied by Rowe from use on B-52 aircraft and had substituted a new system. He stated: "The demand rate is pre-

sently seven per month with 156 assets available with only 75 aircraft remaining unmodified. The available assets will fill all future requirements through the completion of the modification which is August, 1986." Accordingly, he then declared that the "VECP is not approved" and recommended that Rowe's contracts be canceled. He gave no other reason for the cancellation of the contracts. [Cowen, S.C.J., Opinion, p. 7-8].

On April 3, 1985, the same date on which Rowe was notified that the proposal had been disapproved, the procuring agency issued a Termination Authorization to its Termination Activity. The authorization contained a handwritten statement to the effect that in view of the government's delay in approving or disapproving the proposal and the information gained during the investigation of the proposal including Mr. Brakebill's memorandum of February 26,

1985, it was considered that a termination of the contracts for the convenience of the Government would be in the best interests of the Government. However, the form contains another handwritten note, stating that on the recommendation of the termination contracting officer, the recommendation would be changed to one to terminate the contracts for default, after cure and show cause notices were issued. The contracting officer did not issue either a cure or show cause notice. [Cowen, S.C.J., Opinion, p. 9].

The majority opinions affirmed the Board's decision that "the Air Force had ordered the electrical bundles in 1983 and 1984 with the expectation that it would receive bundles which were the same as those which had been qualified and had been procured from Rowe for almost a decade" -[Brown, D.J., Opinion, p. 5]. The dissent reviewed the forgoing facts and con-

cluded that Rowe could not be bound by an unexpressed "expectation," that Rowe was entitled to the presumption that its tendered goods were "equivalent" because of its unrebutted prima facie evidence, and that the only reason for the default terminations, was the unlawful purpose of avoiding a contract for items that were not needed. Because of the serious conflict with the prevailing weight of authority, this petition for a writ of certiorari has been brought.

ARGUMENT

The decision rendered below by the United States Court of Appeals for the Federal Circuit creates considerable uncertainty in the administration of Government contracts and is directly contradictory to decisions of this Court, the Federal Circuit's own rulings, the United States Court of Claims, and other courts of appeals.

The majority opinions[1] reflect such a wide difference of opinion on the issues presented for review so as to raise serious doubt as to the uniform application of law essential for citizens contracting with the United States to base contractual performance in compliance with the terms of the contract and appropriate statutes and regulations.

This Court's review is critical not only to the resolution of the several conflicting decisions by reviewing courts on the questions presented, but is necessary to establish a uniform rule within a circuit that has exclusive jurisdiction to hear appeals from decisions rendered pursuant to the Contract Disputes Act of 1978, 41 U.S.C. 607(g)(1). Since most of the legal requirements of contracting with the

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[1] Each member of the panel wrote an opinion. District Judge Brown, sitting by designation, wrote the main opinion; Chief Judge Nies wrote a concurring opinion; and Senior Circuit Judge Cowen wrote the dissenting opinion.

Government are determined solely in the Federal Circuit the importance in resolving these conflicts warrants this Court's review.

I. THE MAJORITY AFFIRMANCE OF THE IMPOSITION OF AN UNEXPRESSED "EXPECTATION" AS A CONTRACT REQUIREMENT DIRECTLY CONFLICTS WITH A BODY OF LAW THAT CONTRACTORS ARE NOT REQUIRED TO EXERCISE CLAIRVOYANCE IN THE PERFORMANCE OF THEIR CONTRACTS.

(A). The Unexpressed, Subjective, Unilateral Intent of One Party Cannot Bind the Other.

A precedent has been affirmed by the majority opinions which stands for the proposition that a unilateral, unexpressed "expectation" may be imposed as a mandatory contract requirement. Besides introducing an entire new complexion on public contract law, this precedent stands squarely at odds with the body of authority that contractors are not expected to be clairvoyant as to the requirements of their contracts.

As exhaustively detailed by Senior Circuit Judge Cowen in his dissent, and not questioned nor disputed in the affirming opinions, any "expectations" by the Government that only "Okoflex" insulation would be used was unilateral to the Government at best. Both the Government's counsel and its witness repeatedly admitted that there was no requirement for the exclusive use of "Okoflex" in any provision of the Contract nor in any drawing. In fact, the only mention of "Okoflex" in any documentation in connection with the contract terms was in Rowe's own internal cable drawing which clearly, and undisputedly, specified "OKOFLEX OR EQUIVALENT." This evidence, as noted by Senior Circuit Judge Cowen, was not mentioned in either District Judge Brown's Opinion nor the Concurring Opinion.

Rowe's clear right under the express contract provisions was that either "Okoflex" or

an "Equivalent" insulation could be used. Consequently, if the Government truly had a restricted Okoflex "expectation" at any time before it terminated the contracts, that expectation was not shared by Rowe and was not made part of the contract between the parties.

The Opinion and the Concurring Opinion, however, did not address the lack of mutuality in the alleged "expectation" of the Government. Accordingly, the holding in this case stands in direct conflict with several firmly established precedents of the Court of Claims.[3]

In Singer-General, supra, the Court of Claims unequivocally held that the unexpressed, subjective, unilateral intent of one party is insufficient to bind the other. Rather, the

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[3] See e.g., Singer-General Precision, Inc. v. United States, 427 F.2d 1187, 1193 (Ct.Cl. 1970); Corbetta Construction Co., Inc. v. United States, 461 F.2d 1330, 1336 (Ct.Cl. 1972); Blanchard v. United States, 347 F.2d 268 (Ct.Cl. 1965); Firestone Tire & Rubber Co. v. United States, 444 F.2d 547, 551 (Ct.Cl. 1971); Sturm v. United States, 421 F.2d 723, 727 (Ct.Cl. 1971); and L. Rosenman Corp. v. United States, 390 F.2d 711 (Ct.Cl. 1968).

Court found that the Contract terms must first be considered.

> "Routinely, one looks first to the contractual language for dispositive or near-dispositive guidance." Id. at 1189.
>
> "...even if the defendant's men actually harbored... within themselves, the position now taken by the Government in litigation, the result must be the same. We need not expound, once more, that the unexpressed, subjective, unilateral intent of one party is insufficient to bind the other [citation omitted], especially when the latter reasonably believes otherwise. [Citation omitted], Sturm, supra, at 727. It is the objective manifestations which count. [Citations omitted]... The Government, as we are called upon to repeat so often, bears the full burden and the risk when it leaves its contract open to more than one reasonable construction. See Morrison-Knudsen Co. v. United States, Ct.Cl., 427 F.2d 1181, decided this day, and cases cited." Singer-General, supra, at 1193.

To affirm the terminations based upon an unexpressed Government "expectation," the majority opinions have unequivocally rejected a long line of appellate rulings regarding the

Government's responsibilities for its own specifications.

> "Although the specifications and drawings may have been clear as a bell in the mind of the defendant's architect, it is not the subjective intent that is the legal determinant. National Movers Co., Inc v. United States, Ct.Cl., 386 F.2d 999 p. 1001 decided November 9, 1967. Rather it is the representations of the specifications and drawings themselves which represent defendant's intent. And these were not so clear as to compel plaintiff to seek clarification, or as to make defendant's interpretation binding upon plaintiff. [Citations omitted]. 'The Government, as the author (of the contract) has to shoulder the major task of seeing that within the zone of reasonableness the words of the agreement communicate the proper notions--as well as the main risk of a failure to carry that responsibility.' WPC Enterprises Inc. v. United States, 323 F.2d 874, 877 163 Ct.Cl. 1, 6 (1963)." L. Rosenman, supra, at 714.

This majority decision further conflicts with the principle announced in Corbetta, supra. That case involved an action for the cost of repairs to a perimeter cofferdam to maintain its water tight integrity below subgrade. The

specifications had expressly required that the cofferdam permit completion of the work "in the dry" and that the cofferdam was to be cut-off at grade and left in place in the subgrade after completion. In reversing the Board's denial of recovery, the Court of Claims held--

> "Given defendant's ultimate design intent (i.e.,... a permanent water cut-off wall...), defendant's present interpretation of the contract requirements is perhaps plausible. That ultimate design intent appears, however, not from the contract itself, but from defendant's proofs before the Board." [Emphasis added].
>
> "A government contractor cannot properly be required to exercise clairvoyance in determining its contractual responsibilities... Defendant points to nothing in the voluminous contract documents which, objectively viewed, closely and unambiguously prescribed that the steel sheet piling of the perimeter cofferdam was to serve the further function of a permanent water cut-off wall below subgrade." Corbetta at 1336.

Here, the Government's "expectation" does not appear from the contract documents nor does the majority point to any contract language;

rather, as in Corbetta, the "expectation" derives only from infirm past course of dealing testimony offered to the Board.[4] If the majority opinions are permitted to stand, contractors will be subjected to default terminations based on nothing more than a Government whim without expression in the contract requirements in direct contradiction of established principles of public contract law.

(B). Contracts of Adhesion Are to be Strictly Construed.

The Government "expectation" precedent established by the majority opinions strongly conflicts with the fundamental principle that contracts of adhesion are to be strictly construed. The fact that the Government may hold an "expectation" for a sole source brand-name

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[4]The Government's entire previous "qualification" argument rested upon the testimony of a single individual, who testified that he actually had no knowledge of or involvement in any alleged prior qualification or even if it had actually taken place [Appendix below, p. 68, l.2-5; p. 69, l.13-19; p. 99, l.18–101, l.4; p. 110, l.7-15].

material without such terms being expressly included in the contract is wholly irreconcilable with this Court's clear mandate that even the United States of America in conducting business with its citizens is subject to the "maxim that a contract should be construed most strongly against the drafter... [citations omitted]." United States v. Seckinger, 397 U.S. 203, 210, 90 S.Ct. 880, 25 L.ed2d 224 (1970).[3]

The precise terms of the contract, as drafted by the Government, were required to be strictly applied and those terms contained no specifications for any particular insulation. The Government's refusal to inspect and accept the completed cable assemblies under the inspection and acceptance criteria of the Contracts rendered the default terminations unlawful and

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[3] See also Firestone Tire & Rubber Co., supra, at 551, "...the drafting party...must bear the risk of any contractual uncertainty, ambiguity or inequitable consequence. [Citing Sturm, supra]."

the majority opinions sustaining those terminations are erroneous as a matter of law.

(C). The Imposition of a Requirement Based Upon an Unexpressed "Expectation" Violates the Parol Evidence Rule.

Further, the imposition of a requirement for "Okoflex" insulation based upon an "expectation" that was not expressed in either Contract or any drawing or specification also violated the mandate of the parol evidence rule, which prohibits the use of external evidence to add to or otherwise modify the terms of a written contract. As the Claims Court held in Peterson-Sharpe Engineering Corp v. United States, 6 Cl.Ct. 288, 295-296 (1984):

> "the parol evidence rule is not a rule of evidence, but one of substantive law. David Nassif Associates v. United States, 214 Ct.Cl. 407, 557 F.2d 249 (1977); Sylvania Electric Products v. United States, 198 Ct.Cl. 106, 458 F.2d 994, 1005 (1972). It prohibits the use of external evidence to add to or otherwise modify the terms of a written agreement that has been adopted by

> the parties as an expression of their understanding. [Citations omitted]....'The written contract merged all previous negotiations, and is presumed, in law, to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it.' [Citations omitted]." Peterson-Sharpe, 6 Cl.Ct. at 295-296. See also, Hazelting Corp. v. United States, 10 Cl.Ct. 417, 441-442 (1986).

In sustaining the addition of an "expectation" that only the use of "Okoflex" insulation material was permitted, when that "expectation" was not expressed in any Contract documentation, the majority erred as a matter of law in contradicting the rule of contra proferentem and the parol evidence rule.

II. THE MAJORITY IS IN DIRECT CONFLICT WITH THE WEIGHT OF AUTHORITY IN REASONED OPINIONS OF BOTH THE COURT OF CLAIMS AND THE FEDERAL CIRCUIT ITSELF.

The majority decision stands in direct conflict with not only the results reached in

but also the fundamental principles found by several decisions of both the Court of Claims and the Federal Circuit, thereby creating a conflict with the former reviewing court and an intracircuit conflict on this exclusive public contract issue. Review by the Supreme Court is essential to resolve this issue and to add stability and uniformity to the field of public contract law.

A substantial part of both District Judge Brown and Chief Judge Nies' opinions is spent in arguing a distinction with Darwin Construction Co., Inc. v. United States, 811 F.2d 593 (Fed. Cir. 1987)[6] to the present facts. As Senior Circuit Judge Cowen succinctly demonstrated in his dissenting opinion, the majority opinions contradict the Darwin decision.

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[6]The three-judge panel decision in Darwin, supra, was written by then Chief Circuit Judge Cowen and joined in by then Circuit Judge Nies and Circuit Judge Newman.

In Darwin, the Federal Circuit had reversed a termination for default that had been issued because the contractor did not timely provide equipment that was specifically required by the contract. The predicate for the court's decision was that the failure to supply the material did not significantly affect the Government's operations, the termination did not comport with the explicit terms of the procedure required by the regulations in order to issue a default termination, and the evidence indicated that the termination was actually a product of the Government's desire to no longer deal with the contractor.

In the present action, the question of whether the cable was insulated with "Okoflex" or EPR or anything was wholly irrelevant to the Government's operations since it is undisputed that the cable assemblies were never actually needed by the Government in any event. Further,

none of the factors to be considered by the contracting officer under the procedure discussed in Darwin lend any support for the validity of the default terminations imposed on Rowe. And finally, as carefully detailed by Senior Circuit Judge Cowen, the Government's default termination here was simply a pretext for the Government's admitted decision to cancel the contracts because the parts were no longer needed. Yet, under similar circumstances as in Darwin, the default terminations here were affirmed by the majority opinions.

District Judge Brown reads Darwin as a case in which "the Board found that the Navy defaulted Darwin solely because it no longer wished to deal with it." Brown, D.J., Opinion, p. 9. Thus, "relying on the Board's findings of arbitrariness, this Court determined that such arbitrariness provided sufficient grounds for converting the termination for default into a

termination for convenience." Brown, D.J., Opinion, p. 9. In discussing Rowe, however, District Judge Brown suggests that "there is no evidence of record that the Air Force would not have accepted the goods had they been qualified or had the VECP been approved. Thus, the 'unique circumstances' present in Darwin are not present here." Brown, D.J., Opinion, p. 10. Interestingly, there is not one mention by District Judge Brown of the admitted fact that the cable assemblies produced by Rowe were not needed by the Air Force for any purpose. Such a discussion, of course, undermines the conclusion that the "unique circumstances" of Darwin are not present here.

Chief Judge Nies was also unconvinced that the authority of Darwin is inapplicable here but for wholly differing reasons. The Concurring Opinion acknowledges that "the contracting officer was elated to have a basis for terminat-

ing the contractor for default" (Nies, C.J., Opinion, p. 3), but refuses to read Darwin so broadly as to necessitate a termination for convenience based on an "elated" contracting officer.

Chief Judge Nies found that--

> "we held (in Darwin) the contracting officer's decision to terminate for default was a 'clear' failure by the contracting officer 'to comply with [Armed Services Procurement Regulation] 18-618.4(a)(iii) [(codified at 32 C.F.R. 18.618.4(a)].' Id. at 598.
>
> "That regulation requires a contracting officer, in case of default, to consider 'the period of time which would be required for the government or another contractor to complete the work as compared to the time required for completion by the delinquent contractor.' Since the only reason put forth by the government supporting the termination for default was Darwin's untimely performance, the failure to consider the timeliness of another contractor's completion was dispositive in view of the evidence that the completion date could not be accelerated by terminating Darwin." Nies, C.J., Opinion, p. 3-4.

Thus, unlike District Judge Brown, Chief Judge Nies found Darwin decided "not because of motive but because the contracting officer failed to comply with prescribed regulatory considerations. The contracting officer's motive was in fact irrelevant to the result." Nies, C.J., Opinion p. 4.

Yet, Chief Judge Nies concedes that in the present case "the evidence shows that the government stood to benefit as a result of a default termination in that it did not need the B-52 assembly units. Someone at DOD discovered that an adequate supply of the part was on hand, in any event, to meet their requirements during the phase-out of that part." Nies, C.J. Opinion, p. 4. However, the very next statement in the Concurring Opinion contends "[t]here is no evidence that the government would not have accepted goods conforming to the contract. Nor is there evidence that the government was aware

that it did not need the parts prior to Rowe making the goods that it tendered." Nies, C.J., Opinion, p. 4-5. A few sentences later the Concurring Opinion concludes, "[i]n order for the Air Force to accept Rowe's proffered units it would have been required to undertake extensive testing not contemplated by the contract. Had it needed the parts, we can speculate that it might have voluntarily undertaken to perform the tests. But it did not even need the genuine parts, much less substitutes that would required expensive and extensive testing." Nies, C.J., Opinion, p. 5.

By any conceivable stretch of the imagination, Rowe was unlawfully defaulted because not even "Okoflex" was needed. If the majority opinions are allowed to stand, their net affect is to completely rewrite not only Darwin but the regulatory standards to which the Government is held when termination is considered.

As the preceding discussion and the dissenting opinion clearly reflect, there is no distinguishing factor between Darwin and this case. The Darwin court concluded that the contractor was not required to "add another layer of proof by demonstrating that the [default] decision was made in bad faith." Darwin at 598. Here, however, the majority opinions, particularly the concurring opinion, conclude that "there is simply no evidence here of a sinister motive in terminating Rowe." This conclusion is precisely what the Darwin court found was not necessary in order to set aside the default termination.

The dissenting opinion carefully detailed numerous facts established within the record that were completely ignored in the majority opinions. For instance, long before the contracts with Rowe, it is undisputed that on January 14, 1982, the Air Force deleted the

cable assembly for further use on B-52 aircraft and substituted a new system.

> "The Government has admitted that at no time before the award of the two contracts or thereafter to June, 1985, did the Government inform or advise Rowe that the cable assembly insulated with Okoflex was obsolete or was no longer needed or used for its intended purpose in the radar systems of B-52 aircraft. There is no evidence in the record that the cable assemblies ordered from Rowe had any possible use by the Air Force except in the radar system of the B-52 aircraft.
>
> "On February 26, 1985, James R. Brakebill, Deputy Chief, Item Management Division, Directorate Material Management of the procuring agency, issued an internal memorandum which was not communicated to Rowe. First, Mr. Brakebill noted that the 1982 modification had removed the cable to be supplied by Rowe from use on B-52 aircraft and had substituted a new system. He stated: 'the demand rate is presently seven per month with 156 assets available with only 75 aircraft remaining unmodified. The available assets will fill all future requirements through the completion of the modification which is August, 1986.' Accordingly, he then declared that the 'VECP is not approved' and recommended that Rowe's contracts be canceled... He gave no other reason

for the cancellation of the contracts..." Cowen, S.C.J., Opinion, p. 7-8.

Finally, as found by the dissenting opinion, but disregarded by the majority--

> "On April 3, 1985, the same date on which Rowe was notified that the VECP had been disapproved, the procuring agency issued a Termination Authorization to its Termination Activity. App. 146. The authorization contained a handwritten statement to the effect that in view of the government's delay in approving or disapproving the VECP and the information gained during the investigation of the VECP, including Mr. Brakebill's memorandum of February 26, 1985, it was considered that a termination of the contracts for the convenience would be in the best interests of the government. However, the form contains another handwritten note, stating that on the recommendation of the termination contracting officer, the recommendation would be changed to one to terminate the contracts for default, after cure and show cause notices were issued. The contracting officer did not issue either a cure or show cause notice." Cowen, S.C.J., Opinion, p. 9.

As the dissent recognizes, the statements in both majority opinions that there is no

evidence that the Government would not have accepted cables insulated with Okoflex, is completely refuted. Moreover, as Senior Circuit Judge Cowen notes, this case is similar to Schlesinger v. United States, 392 F.2d 702, 709 (Ct.Cl. 1968)[7], in which the contractor's default served only as a useful pretext for a default termination because the agency found it desirable to take that action on grounds unrelated to the contractor's performance.

By disregarding the real reason for Rowe's termination, which as the Government's own documents reflect, would have occurred regardless of Rowe's performance, the majority opinions have crafted a completely new and arbitrary standard by which future termination actions may be judged. Parties contracting with the United States, according to this split Federal Circuit

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[7] Note that this case was also written by then Chief Circuit Judge Cowen sitting along with seven other members of the Court of Claims.

majority opinion, may now be subjected to unexpressed Government "expectations" as the ground for a default termination even when the parts are admittedly no longer needed by the Government.

III. THE MAJORITY ERRED AS A MATTER OF LAW IN FAILING TO RECOGNIZE THE LEGAL PRESUMPTION THAT ONCE A PARTY HAS PRESENTED A PRIMA FACIE CASE THAT THE MATERIALS TENDERED MET CONTRACT REQUIREMENTS THE BURDEN FALLS UPON THE OPPOSING PARTY TO OVERCOME THIS PRESUMPTION.

As discussed in the Dissent, the majority opinions erred as a matter of law in failing to recognize that the Government did not overcome the legal presumption that the materials which Rowe tendered for delivery met the contract re-

quirements.[1] Consequently, the majority must be reversed.

The dissent found that on October 9, 1984, as required by the Government's inspector, Rowe submitted a proposal (VECP), requesting approval to use cable insulated with EPR rather than "Okoflex." Also undisputed is the fact that by December 19, 1984, three Government officials had reviewed the proposal and supporting data and recommended that it be approved. Moreover, the parties stipulated that at no time after December 19, 1984, did any representative of the Government make an attempt to determine whether EPR insulation was equal to or better than "Okoflex" for use on Rowe's two contracts, nor did any representative of the Government make an attempt to determine whether "Okoflex" insula-

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[1] The main Opinion stated that the basis for default is "a failure to provide qualified parts under a military procurement contract." Brown, D.J., Opinion, p. 9. Also, the Concurring Opinion found that "the goods tendered were nonconforming and, thus, when the contract performance period elapsed, Rowe was in default." Nies, C.J., Opinion, p. 2.

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tion was commercially available for use on the two contracts.

Thus, as Senior Circuit Judge Cowen found:

> "The evidence submitted in Rowe's VECP, including the recommendations and statements made by the Air Force representatives, was sufficient to establish a prima facie case that: (1) Okoflex insulation was not commercially available for use in the performance of Rowe's contracts; and (2) the EPR insulation which Rowe proposed to use in manufacturing the cables was equal to or better than the Okoflex insulation. Thereupon, the burden developed upon the government to overcome the presumption that the cables manufactured by Rowe with the use of the EPR insulation were equivalent to cables insulated with Okoflex and met contract requirements. Space Dynamics Corp., ASBCA No. 12085, 69-1 BCA 7662; Jo-Line Tools, Inc., ASBCA No. 7196, 1962 BCA 3478." [Emphasis added]. Cowen, S.C.J., Opinion, p. 6.[9]

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[9]See United States v. Rolin, 491 U.S. 554, 109 S.Ct 2619, 2627, 105 L.Ed.2d 469 (1989) ("The prima facie standard is commonly used by courts in civil litigation to shift the burden of proof from one party to the other.") Also, M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972); Texas Dept. of Comm. Affs. v. Burdine, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981); Ashland Oil, Inc. v. Delta Resins & Refactories, Inc., 776 F.2d 281, 291-92 (Fed. Cir. 1985).

Judge Cowen then observed that the Government wholly failed to discharge its burden. Because the Government failed to overcome the presumption that the cable assemblies which Rowe tendered met contract requirements, the majority opinions affirming the default terminations are erroneous as a matter of law.

IV. THE MAJORITY CONFLICTS WITH THE DECISION OF THIS COURT AND WITH DECISIONS OF APPELLATE COURTS THAT THE FAILURE TO RAISE A DEFENSE IS A WAIVER.

The entire majority decision is premised upon on alleged past course of dealing involving previous contract performance. In allowing and, in fact, relying upon a course of dealing avoidance argument in spite of the Government's failure to plead such a defense and stipulation that it was not making or pleading such a contention, the majority is in conflict with the established rules of pleading under the Federal Rules of Civil Procedure, the Rules of the

Claims Court, other appellate decisions and the decision of this Court in Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 329, 91 S.Ct. 795, 802, 28 L.Ed.2d 77 (1971) ["a party waives all defenses and objections which he does not present either by motion or in answer or reply."].

Both the Board and majority below concluded that the default terminations were acceptable because the Government had an enforceable unexpressed "expectation" that only "Okoflex" insulation would be used based on alleged prior conduct by the parties. [Brown, D.J., p. 6]. It is axiomatic under the Federal Rules that the failure to plead or raise an affirmative defense or avoidance constitutes a waiver of that defense. Fed. R. Civ. P. Rule 8(c).[10] Moreover, an appellate court may not consider on appeal for the first time a question that requires

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[10] See also Zenith Radio, supra.

development of factual issues. Blue Cross and Blue Shield of Alabama v. Weitz, 913 F.2d 1544, 1550 (11th Cir. 1990). Troxler v. Owens-Illinois, 717 F.2d 530 (11th Cir. 1983), citing Hall v. Board of School Commissioners, 681 F.2d 965, 969-70 (5th Cir. 1982). Boley v. U.S. Postal Service, 917 F.2d 19, 20 (Fed. Cir. 1990). Synan v. Merit Systems Protection Bd., 765 F.2d 1099, 1101 (Fed. Cir. 1985).[11] Thus, District Judge Brown's acceptance and complete reliance on the Government's course of dealing avoidance argument as creating an unexpressed Government "expectation" for Okoflex is not only clearly erroneous under prior unequivocal standards of this Court and the Federal Rules but sets a dangerous precedent for reviewing tribunals to fashion their own defense arguments to suit their needs.

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[11] See also this Court's discussion in Taylor v. Illinois, 484 U.S. 400, 420, 108 S.Ct. 646, 658, 98 L.Ed.2d 798 (1988), that an issue, raised for the first time on appeal, is deemed to have been waived.

In his opinion, District Judge Brown stated in a footnote that Rowe's position on appeal concerning the Government's own admitted waiver of a course of dealing argument was "meritless."[12] [Brown, D.J., p. 7, fn. 4]. District Judge Brown's footnote, however, is in direct conflict with the Federal Rules and this Court's teaching in Zenith Radio, supra, as well as the decisions of the Federal Circuit and Eleventh Circuit as discussed infra. Footnote 4 states, "the record, however, does not clearly demonstrate what arguments the Air Force waived, if any." This, of course, clearly contradicts the mandate of Fed. R. Civ. P. Rule 8(c) and Zenith,

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[12] The concurring opinion did not directly address the course of dealing argument, rather that opinion was based on an alternative theory that the Government was not obligated to accept parts which were tendered as equivalent.

Senior Circuit Judge Cowen's dissenting Opinion properly disregarded the untimely course of dealing avoidance argument instead finding the primary cause of the termination to be the Government's delay in approving the proposal submitted by Rowe as well as the fact that the Government actually had no need for the items supplied by Rowe in any event.

which holds that a party waives all defenses and objections which he does not present either by motion or in answer or reply to an earlier pleading. A review of the record below conclusively demonstrates, as Rowe pointed out, that the Government had expressly waived any course of dealing avoidance argument. First, there is not a single mention of course of dealing in any motion, answer or reply of the Government in the proceedings below. That fact alone should have been sufficient under Zenith. Rowe nonetheless pointed further to the Government's express waiver of course of dealing. During a prehearing conference, when Rowe objected to a Government tender regarding past performance actions, the Government's counsel clearly stated:

> "We're not talking about a course of dealing." [Appendix, p. 27, 1.2-3].

Further, during the hearing when the Government counsel began soliciting a line of testimony

regarding past procurements, Rowe objected and the Government responded as follows:

> Rowe's counsel: "As we pointed out in the pre-hearing conference, the Government has never pleaded a course of dealing argument and the Government said they wouldn't.
>
> Government counsel: We are not pleading a course of dealing argument." [Appendix, p.70, l. 16-21].

Consequently, satisfied with this exchange, the Board overruled Rowe's objections satisfied with the Government's counsel assurance that he was "simply illustrating" prior contracts [Appendix p. 70, l.24--71, l.2]. Consequently, District Judge Brown's acceptance and reliance on a course of dealing as creating an unexpressed Government "expectation" is clearly erroneous and an abuse of discretion in that it contradicts the mandate of the Federal Rules and the decisions of this Court and other appellate courts.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinions of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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February 25, 1991

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APPENDIX

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DOCUMENT

Rowe Industries, Inc. v. United States, 918 F.2d 186 (Fed Cir. 1990), Opinion, Concurring Opinion, and Dissenting Opinion, October 5, 1990.

Rowe Industries, Inc., ASBCA Nos. 31875, 31876, 33661, 33662, Opinion, July 31, 1989, 89-3 BCA (CCH) ¶22,155.

Rowe Industries, Inc. v. United States, 918 F.2d 186 (Fed Cir. 1990), Order on Petition for Rehearing, November 27, 1990.

Rowe Industries, Inc. v. United States, 918 F.2d 186 (Fed Cir. 1990), Order on Suggestion for Rehearing in banc, December 7, 1990.

Rowe Industries, Inc., ASBCA Nos. 31875, 31876, 33661, 33662, Opinion on Motion for Reconsideration, November 16, 1989.

STATUTES AND REGULATIONS

Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

United States Court of Appeals
for the Federal Circuit

90-1113

ROWE INDUSTRIES, INC.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: October 5, 1990

Before NIES, Chief Judge,[1] COWEN, Senior Circuit Judge, and BROWN, District Judge.[2]

BROWN, District Judge.

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[1]Judge Nies became Chief Judge on June 27, 1990.

[2]Judge Garrett E. Brown, Jr., United States District Court for the District of New Jersey, sitting by designation.

Appellant Rowe Industries, Inc. ("Rowe") appeals from a decision of the Armed Services Board of Contract Appeals ("the Board") that the Air Force properly terminated for default its contracts with Rowe for the sale of electrical bundles for use in the B-52 bomber. For the following reasons, we will affirm the Board's decision below.

Background

On November 16, 1983, the Air Force, acting through its Oklahoma City Air Force Logistics Center ("OCAMA"), awarded to Rowe contract No. F34601-84-C-0053, the contract required Rowe to supply 80 electrical bundles for use in the B-52 bomb navigation radar system. Forty bundles were to be delivered on or before December, 1984, and the remaining bundles by January 1985.

On May 7, 1984, OCAMA awarded to Rowe a second contract, No. F34601-84-C-1576, for seventy-one more electrical bundles. The contract provided for delivery of the seventy-one bundles by June, 1985 at the same price per bundle as the first contract.

The procurements under these two contracts constituted "restrictive acquisitions" under the Department of Defense's High Dollar Spare Parts Breakout Program. Each contract contained identical clauses providing that only the Boeing Airplane Co. and Groman Corp., Rowe's parent corporation, were approved to provide the electrical bundles.[3]

The contracts' requirements concerning cable insulation were incorporated by reference. The contracts expressly required that Rowe provide the wire assemblies described in Rowe's drawing of part number 4R1044. Rowe's drawing designated Part Number R1035-1 as the cable to be used in the

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[3]The Air Force awarded the contracts to Rowe after Boeing "no bid" the solicitation.

assemblies. Rowe's drawing for Part Number R1035-1 specified the use of "Okoflex Insulation or Equivalent." These cable assemblies, including the Okoflex insulation, were produced by Okonite Company ("Okonite"). Rowe had used Okoflex insulation in the bundles delivered under all prior contracts since 1975. Okonite was the sole supplier of Okoflex insulation.

On May 16, 1984, Okonite notified Rowe that it would no longer produce Okoflex and would replace it with insulation composed of Ethylene/Propylene Rubber ("EPR"). Okonite also forwarded to Rowe documentation in which Okonite asserted that the EPR insulation met or exceeded the applicable requirements for Okoflex.

Rowe subsequently contacted Mr. Richard Barry, a quality assurance representative at the Defense Contract Administration Management Area ("DCASMA") in Detroit, Michigan, to inform him of the change in insulation material. Rowe offered sample cables containing the EPR insulation to Mr. Barry for inspection. Mr. Barry declined to inspect them, however, until Rowe had submitted documentation that the new materials met or exceeded requirements.

Rowe then submitted a formal value engineering change proposal ("VECP"), seeking approval of the modification. Mr. Barry approved the VECP and forwarded it to the Defense Contract Administration Office in Cleveland, Ohio. There is no evidence

of record that Mr. Barry conducted independent tests before giving his approval to the VECP. The Board below found that Mr. Barry had rubber stamped the approval based on Rowe's representations. The VECP thereafter received approval through the next two tiers of review, and was submitted for final approval to OCAMA in Oklahoma City.

OCAMA rejected Rowe's VECP, and advised Rowe accordingly. At the hearing before the Board, Mr. Billy Albritton, the aircraft systems electrical engineer responsible for evaluating Rowe's engineering change proposal, testified that the VECP was not approved because the engineering data supplied by Rowe was insufficient. Mr. Albritton expressed concern that

the testing of the insulation had been done on a coax cable, not an assembly cable. He concluded that the only way the Air Force could find out whether the cable would work with the EPR insulation would be to subject the cable to extensive testing.

Mr. Albritton also testified that during his investigation, he discovered that the cable would be eliminated from the aircraft. The record before the Board demonstrated that the Modification deleting the electrical bundles from the B-52 bomb navigation radar had been released in June, 1980, and was fully approved and implemented by the Air Force by 1982. App. at p. 23. At no time prior to the disapproval of the VECP did the Air Force inform Rowe that the electrical bun-

dles contracted for in the November 16 and May 7 contracts would be obsolete. App. at 24.

The next day, Rowe wrote the Air Force and asked that it reconsider its decision. On April 3, 1985, OCAMA responded that it was evaluating its assets and determining whether the requirement for the items still existed. On July 1, 1985, Rowe informed OCAMA that the cables had been completed, and that they were currently delinquent in delivery on the first contract by seven months because they were waiting on approval of the VECP. The VECP, however, was never approved, and Rowe never tendered delivery of the cables with the EPR insulation. In July, 1985, OCAMA terminated the Rowe contracts for default.

Rowe timely appealed the terminations. The Board sustained the default terminations in its decision issued on July 31, 1989. The Board found that the Air Force had ordered the electrical bundles in 1983 and 1984 with the "expectation that it would receive bundles which were the same as those which had been qualified and had been procured from Rowe for almost a decade." The Board denied Rowe's motion for reconsideration on November 16, 1989. Rowe filed this timely appeal pursuant to 41 U.S.C. § 607(g).

Discussion

I.

Pursuant to 41 U.S.C. § 609(b), factual findings of the Board "shall

be final and conclusive, and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence." Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971); Mayfair Constr. Co. v. United States, 841 F.2d 1576, 1577-78 (Fed. Cir.), cert. denied, 109 S.Ct. 528 (1988).

The Board's legal conclusions are subject to plenary review. Afro-Lecon, Inc. v. United States, 820 F.2d 1198, 1200-01 (Fed. Cir. 1987). Al-

though the Board's interpretation of a contract is a legal conclusion, and therefore freely reviewable, it is afforded careful consideration and great respect. Alvin Ltd. v. United States Postal Service, 816 F.2d 1562, 1564 (Fed. Cir. 1987).

The essential question presented in this appeal is whether the Board properly determined that the contract between Rowe and the Air Force required that the electrical bundles be insulated with Okoflex. The Board held that the contracts created a legally enforceable "expectation" that only Okoflex insulation would be used. The Board found that the expectation derived from the parties' prior conduct:

Since 1975 when it was originally qualified as the sole manufacturer of the bundles, Rowe had supplied the Air Force with parts insulated only by Okoflex; and when it ordered the specific part number for the bundles, the Air Force acted with the expectation that it would receive bundles which were the same as those which had been qualified and had been procured from Rowe for almost a decade.

ASBCA Opinion at 12 (July 31, 1989).[4] The parties' prior and contemporaneous conduct should be considered in interpreting a contract: "a contract must be interpreted in accordance with the parties' understanding as shown by their conduct before the controversy." Julius Goldman's Egg

[4]In its reply brief, Rowe argues that any course of dealing arguments raised by the Air Force should be disregarded because the Air Force waived such arguments before the Board. See App. at 27:2-3, 70:12-71:3. The record, however, does not clearly demonstrate what arguments the Air Force waived, if any. Indeed, at one point in the proceedings, the Board overruled the objection of counsel for Rowe on the waiver issue and permitted counsel for the Air Force to question witnesses regarding performance under prior contracts. Id. at 70:12- 1:3. Accordingly, we find Rowe's waiver argument meritless.

City v. United States, 697 F.2d 1051 (Fed. Cir.), cert. denied, 464 U.S. 814 (1983); see Alvin, Ltd., 816 F.2d at 1566 ("One may not ignore the interpretation and performance of a contract . . . .").

The Board's finding that the parties' conduct and the circumstances surrounding the contract created a legally enforceable expectation was supported by substantial evidence. Rowe's electrical bundles had been pre-qualified under the Department of Defense's High Dollar Spare Parts Breakout Program, which allowed manufacturers other than an original product manufacturer to qualify their products. The regulations for this program emphasize the need for precise

conformance with the approved specifications:

> The exacting performance requirements of specially designed military equipment may demand that parts be closely controlled and have proven capabilities of precise integration with the systems in which they operate, to a degree that precludes the use of even apparently identical parts from new sources, since the functioning of the whole may depend on latent characteristics of each Part which are not definitely known.

48 C.F.R. § 217.7203(C) (1989); 32 C.F.R. § 1-313(c) (1984) (emphasis added). The regulation's requirements hold special relevance to products such as the Rowe electrical bundles, as their role in the bomb navigation radar made them indispensable to the success of the mission. These factors, when considered with a ten year history of Rowe supplying bundles insulated with Okoflex to the Air

Force, provide substantial evidence for the Board's findings.

The Air Force's decision to terminate for default in this instance does not equate with the sort of arbitrary and capricious conduct sufficient to convert a termination for default into a termination for convenience. See Darwin Constr. Co. v. United States, 811 F.2d 593 (Fed. Cir. 1987). Darwin arose out of a default termination by the Navy on a construction contract. Darwin, the contractor, was unable to complete the work within the time limits specified in the contract. Darwin notified the Navy that it had been unable to complete the work because necessary equipment had not been delivered on time, but informed the Navy that it

was physically and financially ready to complete the remaining work. The Navy nevertheless terminated the contract for default, citing Darwin's lack of diligence in failing to complete the work.

On appeal, the Board found that the Navy defaulted Darwin solely because it no longer wished to deal with it. In support of its holding, the Board noted that, among other things, 1) the work that Darwin had performed had been acceptable; 2) the failure to complete the work on time did not interfere with the Navy's use of the building; and 3) at the time Darwin was performing work on the contract, many other construction contractors had suffered delays, and the Navy had not terminated their contracts, but

instead collected liquidated damages. Id. at 595. Thus, based on the "unique circumstances present at the time of default," id., the Board found the Navy's conduct arbitrary and capricious. Relying on the Board's findings of arbitrariness, this Court determined that such arbitrariness provided sufficient grounds for converting the termination for default into a termination for convenience.

There is no evidence of record now before this Court that suggests such arbitrary conduct by the Air Force. The basis for default is not an inconsequential delay in performance, but a failure to provide qualified parts under a military procurement contract. As a contractor, Rowe carries the burden of securing all

necessary material for the performance of its obligations. WRB Corp. v. United States, 183 Ct. Cl. 409, 511-12 (1968). Its failure to do so and its subsequent failure to provide qualified goods constitutes a material breach of the contract. Moreover, there is no evidence of record that the Air Force would not have accepted the goods had they been qualified or had the VECP been approved. Thus, the "unique circumstances" present in Darwin are not present here.

Because the Board's findings that Okoflex insulation was an implicit term of the contract was based on substantial evidence, and because there is no evidence that the Air Force acted arbitrarily or capricious-

ly in defaulting Rowe, the decision below will be

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

90-1113

ROWE INDUSTRIES, INC.

Plaintiff-Appellant,

v

THE UNITED STATES,

Defendant-Appellee.

NIES, Chief Judge, concurring.

I agree that the government's termination of its contract with Rowe for default was proper, but I see the issue quite differently.

The contracts in issue covered the supply of certain preapproved parts for B-52 aircraft. The determinative issue is whether the government was obligated to accept goods which Rowe

tendered as equivalent to parts which had been technically qualified.

Rowe asserts that the value engineering change proposal (VECP) it submitted should have been approved on the basis of the data it submitted showing equivalency between the EPR insulation and Okoflex, or at least the government was obligated to test the assembly units containing the substituted EPR insulation to determine whether or not that insulation was equivalent. The agency found the test data grossly insufficient. It could not be determined that Rowe conducted tests on finished cable and Rowe did not subject the cable to necessary in flight testing. Further, the agency refused to accept and test the substituted part because the contract was for the purchase of preapproved and pre-qualified products. The board agreed, holding:

> Our decision is based upon the nature of the procurements themselves. We are not dealing with a situation where the Air Force was legally obligated to accept equivalent items. Parts contained in the B-52 were developed through an extensive testing program which resulted in the qualification of approved manufacturers and suppliers for specific part numbers. Since 1975 when it was originally qualified as the sole manufacturer of the bundles, Rowe had supplied the Air Force with parts insulated only by Okoflex; and when it ordered the specific part number for the bundles, the Air Force acted with the expectation that it would receive bundles which were the same as those which had been qualified and had been procured from Rowe for almost a decade.

I agree with the board that Rowe's tender of assembly units substituting EPR insulation did not conform to what was required by the contract and that the agency was not required to accept a part which had not been pre-qualified.

In reality, Rowe's substantial claim of loss arises because it proceeded to manufacture the nonconforming cable prior to approval of an

engineering change, which it submitted, calling for the substitution of EPR insulation. I am unpersuaded that that loss should be shifted to the agency. The goods tendered were nonconforming and, thus, when the contract performance period elapsed, Rowe was in default.

I am also unconvinced that the termination for default here must be converted to a termination for convenience under the precedent of Darwin Construction Co. v. United States, 811 F.2d 593 (Fed. Cir. 1987). In order to say the termination for default must be so converted under Darwin, that case would have to be read so broadly as to necessitate termination for convenience when the evidence shows that the contracting officer was elated to have a basis for terminating the contractor for default. I do not read Darwin so broadly.

The facts here are not similar to those in Darwin. Darwin had performed substantially the work required under the contract and was unable to complete performance in a timely manner solely due to a supplier's late delivery of material. The remainder of the work could not be completed by any contractor until August, 1984 due to the Navy's need to use the facility in the interim. When the Navy terminated Darwin seven months before the date the Navy had scheduled for the work to recommence despite Darwin's past performance and clear ability and willingness to complete performance, albeit in an untimely fashion, we held the contracting officer's decision to terminate for default was a "clear" failure by the contracting officer "to comply with [Armed Service Procurement Regulation] 18-618.4(a)(iii) [(codified at 32 C.F.R. 18.618.4(a) (1984))]." Id. at 598. That regulation requires a contracting officer, in

case of default, to consider "the period of time which would be required for the government or another contractor to complete the work as compared to the time required for completion by the delinquent contractor." Since the only reason put forth by the government supporting the termination for default was Darwin's untimely performance, the failure to consider the timeliness of another contractor's completion was dispositive in view of the evidence that the completion date could not be accelerated by terminating Darwin. It was also a "fact" in Darwin that other contractors had suffered delays without the Navy terminating for default and that the Navy did not like dealing with Darwin and were happy to be rid of the company.

The Darwin court rejected the board's ambiguous statement indicating that a contracting officer's "motives" in the decision to terminate for default could never be probed.

However, the Darwin court said no more than that, and the contracting officer's decision was held arbitrary or capricious not because of motive but because the contracting officer failed to comply with prescribed regulatory considerations. The contracting officer's motive was in fact irrelevant to the result.

If we do look at the contracting officer's "motive" in this case, at most the evidence shows that the government stood to benefit as a result of a default termination in that it did not need the B-52 assembly units. Someone at DOD discovered that an adequate supply of the part was on hand, in any event, to meet their requirements during the phase-out of that part.

There is no evidence that the government would not have accepted goods conforming to the contract. Nor is there evidence that the government was aware that it did not need the parts prior to Rowe making the goods that it

tendered. There is simply no evidence here of a sinister motive in terminating Rowe. The goods were not obtained elsewhere as in Darwin. No regulation was violated. Indeed, Rowe points to nothing in the facts or precedent which required the government to terminate for convenience rather than default when it is clear that the contractor could never be able to supply the prequalified assembly units required by the contract. In order for the Air Force to accept Rowe's proffered units it would have been required to undertake extensive testing not contemplated by the contract. Had it needed the parts, we can speculate that it might have voluntarily undertaken to perform the tests. But it did not even need the genuine parts, much less substitutes that would require expensive and extensive testing.

I finally note that while technically the claim decided by the board was the agency's claim for breach, the board's ruling at the same time mooted appellant's claims for termination for convenience damages. Our affirmance of the termination for default, however, does not necessarily mean that the government is entitled to any damages. It is undisputed that the default saved the government money because it had, in any event, an oversupply of the spare parts covered by the contracts.

In sum, I would affirm on the basis of the board's opinion.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-1113

ROWE INDUSTRIES, INC.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendants-Appellees.

COWEN, Senior Circuit Judge, dissenting.

I cannot join in either of the opinions affirming the Board's decision. In my view, the facts found by the Board, plus undisputed facts not included in the Board's decision,[1] demonstrate that the Board erred by failing to convert the contracting officer's termination of the contracts

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[1]When a board of contract appeals fails to make a relevant finding of fact, the court may make supplemental findings based on undisputed facts. Blinderman Const. Co. v. United States, 695 F.2d 552, 555, n.2 (Fed. Cir. 1963).

for default into a termination for the convenience of the government.

I

The affirming opinions, and the Board's decision upon which they are based, rest upon an assumption which I believe is erroneous: namely, that Rowe's contracts required it to furnish only cables insulated with the Okoflex material which had been supplied by Rowe in previous contracts. The conclusion is not supported by the Board's findings and is contrary to the record generally.

The record amply supports Rowe's position that under the terms of the contracts, it had the right to submit equivalent insulation and did so when Okoflex was no longer available for the performance of the contracts.

The government's cross-motion for summary judgment before the Board, ¶ 6 stated that Rowe's drawing for the cable to be utilized in the assemblies provided for the use of "Okoflex insulation or equivalent." App. 26. Three times during the hearing before the Board, the government's attorney, Mr. Fields, admitted that the contract did not specifically require Rowe to provide Okoflex insulation. Mr. Fields stated: "There is nothing in the contract that specifically says in writing that you will provide Okoflex insulation." App. 27, 33.

Again, at App. 100, Mr. Fields stated "Objection, your Honor. I repeat that my witness has already testified to the fact that there is no specific provision in the contract

that says that a certain type of insulation is required."

The government based its contention that Okoflex was required in the contracts upon a part number in a drawing made by the Boeing Company and upon the fact that Rowe's drawing contained that same part number. However, Rowe's drawing specified the use of "Okoflex insulation or equivalent." Mr. Billy Albritton, the government's witness upon whose testimony the Board relied heavily, testified as follows: "Q: Mr. Albritton, we agree the word Okoflex does not appear on that drawing? A: It does not appear on that drawing. Q: The word insulation does not appear on that drawing? A: That's correct." App. 93. Mr. Albritton also testified as follows:

"The insulation is specified on the Rowe drawing. The Rowe drawing is identified in the contract." App. 108.

Even if the government expected Rowe to deliver cables insulated with Okoflex, that expectation did not alter Rowe's contractual obligation, which was to furnish cables insulated with "Okoflex or equivalent."

II

After the contracts had been executed, the Okonite Company, which had supplied the insulated cables to Rowe, advised Rowe that the manufacture of Okoflex had been discontinued and that Okonite was substituting ethylene/propylene rubber (EPR) for the insulation in the cables. At that

time, Okonite certified that the EPR insulated cable had been fully tested and met all the applicable requirements. However, the government's inspector refused further inspections of Rowe's cables containing the new insulation until after Rowe had submitted documentation that the new material met or exceeded the contract requirements for "Okoflex or its equivalent." As a result of that action and the government's subsequent delay, Rowe was prohibited from making any deliveries until after the expiration of the delivery deadlines. On October 9, 1984, Rowe submitted to the procuring agency a proposed change order (VECP), requesting approval of cables insulated with EPR rather than Okoflex. Rowe attached the results of a

functional test of the cables with the new material and a statement that the substitute was equal to or better than Okoflex, which was no longer available. The Air Force's inspector approved the VECP with a comment that the cable with Okoflex was no longer available, but that the new material was a better material in all respects and would benefit the government by extending the life of the cable assemblies. On December 14, 1984, Mr. Ayers, an engineer with the Defense Logistics Agency of the Air Force, issued a memorandum stating that he had reviewed the VECP for technical adequacy, gross effect on cost, and other factors. He also stated that he could not verify Rowe's claim that the substituted cable had a higher reli-

ability than the Okoflex cable, but that he had sufficient test data to show that a cable using the EPR insulation was equal to or better than the Okoflex cable. He then recommended that the contracting officer approve the VECP as soon as possible. On December 18, 1984, the administrative contracting officer forwarded the VECP and supporting data, along with Mr. Ayers memorandum of December 14, 1984, to the procuring agency. His forwarding document stated that he had reviewed Mr. Ayers' technical report and concurred in the findings set forth therein. He requested a prompt decision on the VECP.

On December 19, 1984, Rowe requested that the time for making deliveries under the contract be extend-

ed for a period of eight weeks after approval of the VECP. The extension was not granted.

On April 3, 1985, almost six months after the VECP had been submitted, the government notified Rowe that the VECP had been disapproved.

On July 10, 1985, the termination contracting officer terminated Rowe's contracts for default. The termination was based on the fact that deliveries were not made by the due date of the second contract, June 1985. App. 22, 42.

The parties have stipulated that at no time after December 19, 1984, did any representative of the government make an attempt to determine whether the properties, characteristics, form, fit, and function of the

EPR insulation were equal to or better than those of Okoflex insulation for use on Rowe's two contracts. The parties have also stipulated that at no time after December 19, 198, did any representative of the government make an attempt to determine whether Okoflex insulation was commercially available for use on the two contracts.

The evidence submitted in Rowe's VECP, including the recommendations and statements made by Air Force representatives, was sufficient to establish a prima facie case that: (1) Okoflex insulation was not commercially available for use in the performance of Rowe's contracts; and (2) the EPR insulation which Rowe proposed to use in manufacturing the cables was

equal to or better than the Okoflex insulation. Thereupon, the burden devolved upon the government to overcome the presumption that the cables manufactured by Rowe with the use of the EPR insulation were equivalent to cables insulated with Okoflex and met contract requirements. Space Dynamics Corp., ASBCA No. 12085, 69-1 BCA, ¶ 7662; Jo-Line Tools, Inc., ASBCA No. 7196, 1962 BCA ¶ 3478. The stipulation quoted above established that the government wholly failed to discharge that burden.

Because the government failed to overcome the presumption that the material which Rowe proposed to deliver met contract requirements, the Board erred in failing to convert the

termination to one for the convenience of the government.

III

It is undisputed that after May 16, 1984, Okoflex was not available and not obtainable from the Okonite Co., Rowe's previous supplier and the sole source of Okoflex. These facts, plus other evidence submitted in support of Rowe's VECP, were sufficient to raise the issue that it would be impossible for Rowe to make deliveries of the material unless the government permitted Rowe to substitute EPR insulated cable for the Okoflex cable. Thereupon, it was the government's duty to act promptly on the VECP, since the government was well aware of the delivery schedule and knew that

its own representatives had urged prompt approval of the VECP. However, the government unreasonably delayed action on the VECP for six months, by which time the dates on which Rowe was required to deliver the material had passed. That delay was the primary cause of the default which the contracting officer utilized as the basis for terminating the contract. Under the circumstances, the Board should have held that Rowe's failure to deliver on the dates required was excusable and without its fault or negligence. Following that determination the Board should have then converted the default termination to a termination for the convenience of the government. Milwaukee Transfer Co., ASBCA No. 10814, 66-1 BCA, ¶ 5570.

IV

After a careful study of the entire record, including the reporter's transcript of evidence adduced at the hearing before the Board, I am convinced that the real reason for the government's disapproval of the VECP and the termination of Rowe's contracts was the fact that the Air Force no longer had any need or use for the cables insulated with Okoflex. On January 14, 1982, the Air Force issued a modification which removed or deleted the cable assembly using the Okoflex insulation for further use on B-52 aircraft and substituted a new system.

The government has admitted that at no time before the award of the two contracts or thereafter to June, 1985,

did the government inform or advise Rowe that the cable assembly insulated with Okoflex was obsolete or was no longer needed or used for its intended purpose in the radar systems of B-52 aircraft. There is no evidence in the record that the cable assemblies ordered from Rowe had any possible use by the Air Force except in the radar systems of the B-52 aircraft.

On February 26, 1985, James R. Brakebill, Deputy Chief, Item Management Division, Directorate Material Management of the procuring agency, issued an internal memorandum which was not communicated to Rowe. First, Mr. Brakebill noted that the 1982 modification had removed the cable to be supplied by Rowe from use on B-52 aircraft and had substituted a new

system. He stated: "The demand rate is presently seven per month with 156 assets available with only 75 aircraft remaining unmodified. The available assets will fill all future requirements through the completion of the modification which is August, 1986." Accordingly, he then declared that the "VECP is not approved" and recommended that Rowe's contracts be cancelled. His letter concluded with a statement that his memorandum constituted the closing action on the VECP. He gave no other reason for the cancellation of the contracts, and in view of his position in the procuring agency, I think we must accept his memorandum as an authoritative determination by the procuring agency that the government no longer had any need for the cables

to be supplied by Rowe and that the contracts were terminated for that reason.

The contracting officer directed the engineer, Billy Albritton, to make an analysis of the VECP for the purposes of determining whether the cables with the EPR insulation were equal to or better than the cables insulated with Okoflex. Mr. Albritton testified that he declined to make that analysis because it would require an extensive period of testing and a considerable outlay of money. Tr. 1-213, 214. He also stated that at the time he reviewed the VECP, he learned that the government no longer had any use for the cables to be supplied by Rowe. Therefore, he recommended as Mr. Brakebill had previously recom-

mended, that the contracts be cancelled. Tr. 2-118.

On April 3, 1985, the same date on which Rowe was notified that the VECP had been disapproved, the procuring agency issued a Termination Authorization to its Termination Activity. App. 146. The authorization contained a handwritten statement to the effect that in view of the government's delay in approving or disapproving the VECP and the information gained during the investigation of the VECP, including Mr. Brakebill's memorandum of February 26, 1985, it was considered that a termination of the contracts for convenience would be in the best interests of the government. However, the form contains another handwritten note, stating that on the

recommendation of the termination contracting officer, the recommendation would be changed to one to terminate the contracts for default, after cure and show cause notices were issued. The contracting officer did not issue either a cure or a show cause notice. As previously stated, he terminated Rowe's contracts on July 10, 1985.

There is a statement in both of the affirming opinions that there is no evidence that the government would not have accepted cables insulated with Okoflex if Rowe had tendered them on time. In my opinion that speculative statement is completely refuted by what actually occurred. The Termination Authorization of April 3, 1985, referred to above, shows that Rowe's

contracts were terminated because of Mr. Brakebill's determination that the material was no longer needed by the Air Force.

In summary, this case is, as I see it, like Schlesinger v. United States, 392 F.2d 702, 709 (Ct. Cl. 1968), in which the contractor's default served only as a useful pretext for a default termination, because the agency found it necessary to take that action on grounds unrelated to the contractor's performance. In this case, the Air Force terminated Rowe's contracts on the stated ground that it had defaulted in making the required deliveries, but the real reason for the termination was that the Air Force had no need or use for the materials to be supplied by Rowe, either at the time

the contracts were entered into or at any time thereafter.

For all the reasons stated above, I would reverse the Board's decision and remand the case with instructions that the Board should convert the termination for default into one for the convenience of the government.

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Rowe Industries, Inc.	)	ASBCA Nos.
	)	31875 31876
	)	33661 33662
Under Contract	)	
Nos. F34601-84-C-1576	)	
F34601-84-C-0053	)	

APPEARANCES FOR THE APPELLANT: Charles E. Raley, Esq.
James S. Phillips, Esq.
Israel & Raley
Washington, D.C.

APPEARANCES FOR THE GOVERNMENT: Colonel Robert L. Schaefer, USAF
Chief Trial Attorney
Gerald K. Fields, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PAUL

Appellant Rowe Industries, Inc. (Rowe) filed two timely appeals (ASBCA Nos. 31875, 31876) from the contracting officer's final decisions terminating its supply contracts for default. In addition, Rowe filed two appeals (ASBCA Nos. 33661, 33662) after the Air Force's contracting officer declined to issue final decisions with respect to its claims for

termination costs. The Contract Disputes Act, 41 U.S.C. § 601 et seq., is applicable; and only the issue of the propriety of the default terminations is before us for decision. A three/day hearing was held at the Board's offices in November 1988, each party filed one set of briefs, and appellant later filed a motion to strike the Government's brief.

FINDINGS OF FACT

1. On 16 November 1983, Rowe was awarded contract No. F34601-84-C-0053 by the Oklahoma City ALC/AFLC, Directorate of Contracting & Manufacturing, Tinker AFB, Oklahoma, to supply 80 "BUNDLE AY BOMBING NAV SYSTEM" at a unit price of $1,419.20 in a total amount of $113,536.00. Forty bundles were to be delivered on or before December 1984, and the remaining 40 bundles were to be delivered on or before January 1985. (ASBCA 31876, exh. A-1)

2. On 7 May 1984, Rowe was awarded contract No. F34601-84-C-1576 by the same contracting authority to supply 71 bundles at a unit price of $1,419.20 in a total amount of $100,763.20. All of the bundles were to be delivered on or before June 1985. (ASBCA 31875, exh. A-1)

3. Both contracts resulted from procurements negotiated pursuant to 10 U.S.C. §2304(a)(10); and the procurements constituted "restrictive acquisitions" under the "DOD High Dollar Spare Parts Breakout Program." The contracts contained identical clauses M-4(a) which stated that under the "Breakout Program," only "the source(s) listed in paragraph (g) below have been approved by the Government to supply the item(s) required by this solicitation." The only approved sources listed in the contracts were "THE BOEING CO" and "GROMAN

CORP." The latter concern was Rowe's parent corporation. (ASBCA 31875, 31876, exh. A-1)

4. The bundles at issue comprised an integral part of the electrical power system for the bomb navigation radar on B-52H aircraft manufactured by Boeing (tr. 1/233). As such, they were critical to the "mission support" for the aircraft (tr. 1/190-95, 201).

5. The contracts required Rowe to provide "P/N 39-5043-501." This part number was depicted on Boeing drawing 39-5043 which referred to Rowe part number and drawing 4R1044 for the "HV CABLE ASSEMBLY BOMBING NAV SYSTEM." The Rowe drawing in turn referred to Rowe part number and drawing R1035-1 which was entitled "CABLE, 16 PULSE LOW TEMP. (4 BRAIDS)." (ASBCA 31875, 31876, exh. A-1, -2; exh. G-1)

6. In order to qualify contractors like Rowe as approved sources for critical parts such as the bundles at issue in these appeals, the Air Force engaged in an exhaustive testing program which included laboratory testing, humidity testing, temperature testing, vibration testing, shrink testing, interference radiation testing, and flight and altitude testing on actual B-52 aircraft (tr. 1/201-02). Accordingly, once a part had been qualified through such testing, it could not be altered without resort to an equally extensive testing program (tr. 1/211-13).

7. As set forth in a revision of Boeing drawing 39-5043, the "ONLY SUPPLIER SOURCE QUALIFIED" to manufacture the bundles since 1975 was Rowe; and, in fact, Rowe was the sole supplier to the Air Force of these parts from 1975 until 1984 (exh. G-1; tr. 1/193-99; ASBCA 31875, 31876, exh. A-3). Beginning in 1975

when it was qualified as the sole manufacturer of the bundles, Rowe insulated the parts only with the proprietary material called Okoflex which was produced by the Okonite Company (ASBCA 31875, 31876, exh. A-2; tr. 1/193). Rowe continued to use Okoflex as its only insulation material up to and including the time when the instant contracts were negotiated (tr. 1/193).

8. There is no record evidence demonstrating that Rowe ascertained whether Okoflex would continue to be available before it executed the subject contracts.

9. Sometime in May 1984, a representative of Okonite verbally informed one of Rowe's employees, Mr. Dallas Fultz, that Okonite was ceasing manufacture of Okoflex and would replace it with insulation composed of EPR, i.e., Ethylene/Propylene Rubber (tr. 3/22, 27-28). Okonite also forwarded to Rowe a

"CERTIFIED TEST REPORT" and "CERTIFICATE OF COMPLIANCE" in which it stated, in pertinent part: "THE OKONITE COMPANY hereby certifies to the Customer named above [Rowe] that the above described materials [EPR insulation] were duly tested during manufacture and that the Materials meet or exceed the Applicable requirements" (ASBCA 31875, 31876, exh. A-3).

10. "DCASR Cleveland" was to make payment under the contracts; and the contracts were administered by "DCASMA Detroit." (ASBCA 31875, 31876, exh. A-1) Subsequent to his conversation with Okonite's representative, Mr. Fultz of Rowe informed DCASMA's quality assurance representative (QAR), Mr. Richard Barry, of the change in insulation material from Okoflex to EPR and of Okonite's willingness to "certify that material, the EPR material, to be equivalent or better than what

we had been receiving in the past." (Tr. 3/23-24)

11. At some point prior to the delivery dates under the contracts, Rowe proffered sample cables containing EPR insulation to DCASMA's QAR. But once he discovered that the insulation material had been altered, the inspector declined to proceed "until Rowe submitted documentation to cover the difference in the materials" (tr. 3/45-46).

12. Clauses H-60a of the contracts, entitled "CONFIGURATION CONTROL," provided: "The procedures of MIL-STD 481 shall apply as applicable in the configuration control of the items set forth in Section B hereof unless DOD STD-480 is specifically called out by statement of work attached" (ASBCA 31875, 31876, exh. A-1). The current version of this standard, MIL-STD-481A, defined "Configuration control" as: "The systematic evaluation,

coordination, approval or disapproval, and implementation of all approved changes in the configuration of an item after formal establishment of its configuration identification." (Exh. A-5)

13. The standard also defined an "Engineering change" as: "An alteration in the configuration of an item, delivered, to be delivered, or under development, after formal establishment of its configuration identification." In addition, it defined an "Engineering change proposal" as: "A term which includes both a proposed engineering change and the documentation by which the change is described and suggested." (Exh. A-5)

14. MIL-STD-481A also stated the following "REQUIREMENTS FOR ENGINEERING CHANGES":

> 4.1.1 The contractor shall not incorporate any engineering change in an item as described in the configuration

identification prescribed by the contract unless an engineering change proposal (ECP) has been approved as set forth herein. Contractual authorization will be required prior to incorporation of an ECP which affects contract cost, fee, schedule or technical requirements specified either in the contract or in the configuration identification prescribed directly by its identifying number in the contract.

4.1.2 Expediting engineering change proposals. An engineering change proposal which, in the contractor's judgment, requires immediate action may be initiated by teletype or by telephone or personal contact to be followed by contractor's written statement within three (3) days. If the initial reaction by the addressee of the communication is

favorable, a written ECP in accordance with this standard shall be submitted as soon as practicable, but not later than 30 days after the first communication.

4.5.1 Disapproval. When an ECP is disapproved, the COA or PCO will notify the contractor of such disapproval in writing.

4.5.2 Approval. Approval of an ECP will be achieved by (a) the signature on the ECP form of an authorized representative of the Government procuring activity, or of a review activity delegated such authority, and by the return of an approved copy (copies) to the contractor, or by (b) contractual authorization when the ECP affects the contract (see 4.1.1). If the procuring activity or purchasing office is not the military activity responsible for

technical requirements, the concurrence of such military activity (or in the case of a MIPR (Military Interdepartmental Procurement Request) the concurrence of the Requiring Department shall be obtained prior to contractual action on an ECP affecting technical requirements of the contract or of a document prescribed directly by its identifying number in the contract.

(Exh. A-5)

15. In accordance with the requirements of MIL-STD-481A, Rowe forwarded an engineering change proposal to DCASMA's QAR, Mr. Barry, on 5 October 1984. It included a "DESCRIPTION OF CHANGE" which stated:

Primary dielectric material of cable will change. Results of tests performed on assemblies using this new material show an improvement in the critical areas of

dielectric strength, corona inception voltage, DC resistance and insulation resistance. (see test results attached). In the past, Rowe has replaced several cables of similar construction with cables using the new material. Results have shown that these assemblies worked as well, if not better, both mechanically and electrically.

Rowe also stated the "NEED FOR CHANGE" on its proposal in these terms:

The cable is no longer available as previously supplied due to material change. The change will be a value engineering change. (see block 21) See test results attached for a comparison of old and new cables.

With respect to "EFFECT ON ASSOCIATED EQUIPMENT," Rowe asserted: "No known effect";

and regarding "EFFECT ON PRODUCTION DELIVERY SCHEDULE," it stated:

> Contract 0053 - 30 days after ECP approval.
>
> Contract 1576 - No effect.

(ASBCA 31875, 31876, exh. A-2)

16. Rowe attached a page of "LABORATORY MEASUREMENTS" which included a "Dimensional Check." Under this heading, Rowe stated: "Cable diameter was increased from .565 + .020 to .588 + .020." In addition, Rowe described the results of a "Functional Check" as follows:

> Assembly under evaluation performed exceptionally well. Insulation resistance and corona inception voltage were increased and DC resistance was slightly decreased. Dielectric strength DC leakage was decreased at a higher voltage.

(ASBCA 31875, 31876, exh. A-2)

17. DCASMA's QAR, Mr. Richard Barry, attached a standard DD Form 1998, "COMMENTS ON WAIVER, DEVIATION OR ENGINEERING CHANGE REQUEST," to Rowe's request and apparently forwarded the package to DCASR's Cleveland office where it was reviewed by Mr. Ayers, a professional engineer. In the section of the form marked "COMMENTS AND/OR REMARKS," Mr. Barry stated:

> Previous cable is no longer available. The new material is a better material in all respects and should benefit the Government by extending the service life of this cable assembly.

There is no evidence demonstrating that Mr. Barry conducted any independent tests on the new cables; and it is apparent that he was simply endorsing the test results given to him by Rowe (ASBCA 31875, 31876, exh. A-2).

18. On 14 December 1984, Mr. Ayers of DCASR forwarded an inter-office memorandum to "DCASR CLE-GTAC-N3" concerning Rowe's engineering change proposal. Noting that he had visited Rowe's plant and examined the pertinent contract specifications, Mr. Ayers also asserted: "The subject Value Engineering Change Proposal (VECP) was reviewed for technical adequacy of the description of change, gross effect on cost, productibility, schedule, and submittal of minimum documentation required by DAR 7-104.44a(1)." In addition he stated:

> The price of the subject contract will not change, but the contractor estimates that there will be collateral savings. The amount of these savings is to be determined by the Government.

Mr. Ayers closed his memorandum by stating:

11. ENGINEERING CONSIDERATIONS:

The contractor claims he cannot purchase the cable as specified. He also claims that the proposed cable has a higher reliability than the one specified and this will save money for the Government. The DCASMA Engineer does not have sufficient information to verify the contractor's claim. However, he does have test data to show that a cable using the proposed insulation is equal or better to that specified.

12. CONCLUSION:

Based on review of the DAR requirements and contract clauses, the gross effect on schedule, costs and productibility, the DCASMA Engineer recommends the Contracting Officer approve this VECP as

soon as possible to maximize the amount of cost savings and complete the contract.

(ASBCA 31875, 31876, exh. A-7)

19. On 18 December 1984, Mr. Jerry A. Crook, an administrative contracting officer for DCASMA, forwarded Mr. Ayers' memorandum, along with Rowe's engineering change proposal and other supporting materials to:

Commander
Oklahoma City Air Logistics Center/AFLC
Directorate of Contracting & Manufacturing
ATTN: PNWAM/Jackie Naus
Tinker Air Base, Oklahoma 73145

Mr. Crook closed his cover letter by stating:

3. I have reviewed the contents of the related technical report and concur with the findings set forth therein.

4. Prompt attention in furnishing a decision in this matter will be appreciated.

(ASBCA 31875, 31875, exh. A-7)

20. As we have found, the Oklahoma City Air Logistics Center/AFLC, Directorate of Contracting & Manufacturing, was the Governmental procuring activity which awarded the contracts to Rowe. In addition, the AFLC was the Air Force command which was responsible for initially qualifying Rowe as a source for the cables through the extensive testing which we have discussed (tr. 1/197-201). Finally, in accordance with the requirements of MIL-STD-481A, AFLC was the Governmental office responsible for approving or disapproving Rowe's engineering change proposal (exh. A-5; tr. 1/205-06).

21. On 19 December 1984, Mr. D. L. Mang of Rowe wrote the following letter to Mr. Crook of DCASMA:

We hereby request a contract extension on

subject contracts due to the fact we are awaiting approval of an ECP-001 submitted October 5, 1984. We request that the delivery be extended to eight (8) weeks after ECP approval for Contract 84-C-0053. Contract 84-C-1576 would be per contract delivery date or fourteen (14) weeks after approved whichever is later. If you have any questions, contact the undersigned.

(ASBCA 31875, 31876, R4, tab 4)

22. On 24 January 1985, Mr. Max E. Williams, the Chief of the Planning and Technical Support Branch, Directorate of Contracting and Manufacturing, AFLC, responded to Rowe as follows:

1. Thank you for your subject VECP. Control number VECP 85-1 has been assigned for reference. All correspondence pertaining to this VECP should

cite the control number. Your VECP has been forwarded to an action office for evaluation and comment.

2. A target date of 20 February 1985 has been established for our reply to you.

(ASBCA 31875, 31876, R4, tab 5)

23. On 26 February 1985, Mr. James R. Brakebill, Deputy Chief, Item Management Division, Directorate Material Management, wrote the following internal memorandum:

1. Engineering evaluation and investigation has been completed and the following is provided for completion of VECP.

a. Cable PN 39-5043-501, NSN 1680-00-722-2321FG, Rowe Ind PN 4R1044 is used in the B-52G and H aircraft to supply high voltage pulse power to the

radar. The B-52 OAS modification removes this cable and the radar parts, and installs a new system.

b. The monthly demand rate is presently seven per month with 156 assets available with only 75 aircraft remaining unmodified. The available assets will fill all future requirements through the completion of the modification which is August 1986.

c. With the information provided and discovered during this VECP evaluation and investigation, subject VECP is not approved and our recommendation would be to cancel

existing Contracts F34601-84-C-0053 and F34601-84-C-1576.

2. This letter constitutes closing action on VECP 85-01, and also OC-ALC MIP OCIBB 85-0007. If any further assistance is required, please advise Mel Morrow, MMIRBFM, ext 63991.

(ASBCA 31875, 31876, exh. A-8)

24. Mr. Billy C. Albritton was the aircraft systems electrical engineer who was responsible for evaluating Rowe's engineering change proposal (tr. 1/178-80). He explained the Air Force's decision to disapprove Rowe's proposal in these terms:

A. The data that Rowe Industries supplied with the VECP was not sufficient to make an engineering decision on whether or not it would work, the cable

would work, with this type of insulation in the B-52 aircraft radar system. So under these conditions, in other words, I could not use their data and make a decision. I would have to gather more data on my own.

The only way I could gather this data is through a qualification and I kept looking at it. I came to a decision that Rowe was not only changing, what they were trying to say that they were only changing the insulation on the cable. That's misleading.

What they were actually doing is changing the Coax cable which is the old concept of the cable harness itself. It's to transmit a signal from one black box to another black box. They in turn were taking a qualified coax cable which

in my mind would have to be essentially re-qualified.

The only way that we would do this would be with an extensive test program using engineering funds through the Boeing Aircraft Company. It's my estimate that it would take from three months to several years to do this depending upon the priority that you put on it and the funds and the availability of an aircraft. You would have to go through an extensive test program or test lab, humidity, altitude, temperature changes, and then actually get access to the product. We did not have this access through the contract.

We would have to make another contract with Rowe Industries whereby that they would provide us one cable, two cables, or three cables. Normally

engineering requires three items so that if they have a failure it doesn't scrap the whole program. If we try to test just one cable harness and certify it and then it fails, then that's the end of your program until you go back and get another unit.

It was also during this period of time that I found out that the OAS mod was going to eliminate this cable in the aircraft and that would be no longer a need for the cable. At this time I was not aware of any production on the cable.

In other words, a VECP requires engineering approval prior to production. So I assume that there's no production so you cancel the contract.

Q. You indicated earlier that the information that you received from Rowe was insufficient.

A. Correct.

Q. Could you be more specific in what you mean by insufficient.

A. Rowe had only two pages with the VCEP. These two pages only contained some -- the material was changed on the cable and some voltage readings that they made and corona readings. AC voltage and DC voltage.

I could not determine and I don't believe that they made any test on a finished cable. I could only make a determination from that that the test that they run was on the coax cable, not an assembly cable.

Q. What's the difference between the two? A coax and an assembly cable.

A. An assembly cable would be the equivalent to the Boeing product with the

DKLs and the connectors mated on the end of it. The connectors to me are important because one of the things that changed on the cable was the dielectric or the insulator.

Insulators on this cable are very sensitive to this 90 degree turn that I spoke of earlier and the 90 degree turn violates the normal curvature of a coax cable which is normally ten times the diameter of the cable. This cable makes a 90 degree turn through the -- and that violates that. Often times if the dielectric is not properly [sic] it goes off center or not symmetrical. If this happens then the signal from the B-51 radar will burn the cable. It will destroy itself in a short orbit because it won't handle the fire.

Q. Regarding the information that you reviewed that was submitted by Rowe Industries, did they provide you with any

information regarding flight test with the proposal of the new cable?

A. None whatsoever.

(Tr. 1/212-15)

25. On 8 March 1985, Mr. Max E. Williams of the Directorate of Contracting and Manufacturing, AFLC, wrote to "PMWAB (McDaniel)":

> 1. Attached for your action in accordance with TAFBR 320-1 is OC-ALC/MMI letter dated 26 February 1985 which disapproves subject VECP.
>
> 2. Request a copy of your correspondence to contractor be provided PMDM for the VECP file.

(ASBCA 31875, 31876, exh. A-9)

26. Through a telephone conversation on 12 March 1985 Mr. Lohman of DCASMA advised Mr. Mang of Rowe that the Air Force had disap-

proved its engineering change proposal. On 13 March 1985, Mr. Mang asked the Air Force to reconsider its decision. He wrote, in pertinent part: "We are unable to complete the contracts . . . unless we receive an approval of the VECP-85-1 or through some other means your acceptance of our requested change in cable material." Mr. Mang also wrote:

> The special cable used in this cable assembly is no longer available as previously sup- plied and has been substituted with an EPR type insulation system. As our data indicates with the VECP, the new construction is of a far superior quality from an electrical standpoint that we feel this change will only improve the overall system reliability and performance.

> This same material change has been accepted by Hughes Aircraft Company on the F-14 radar cable assembly which uses a different connector series but the same cable construction. It is also being used in all of our other design high voltage cable assemblies for military radar systems.

(ASBCA 31875, 31876, R4, tab 7)

27. On 3 April 1985, Mr. Bill D. McDaniel of the Directorate of Contracting and Manufacturing, wrote to Rowe as follows:

> Referenced VECP has been disapproved by cognizant Air Force agency. The United States Air Force is evaluating present assets at this time to see if the requirement for the items still exist [sic].

(ASBCA 31875, 31876, R4, tab 8)

28. On 26 April 1985 Mr. Mang of Rowe wrote to the Air Force's termination contracting officer, Mr. H. A. Telowicz, concerning the "possible termination by the government." He concluded his letter by asserting:

> Based on the technical justification and the fact that Rowe has maintained an open line of communication between DCASMA-Detroit and Tinker Air Force Base ALC/AFLC regarding this contract. [sic] Rowe would accept a 100% cancellation of contract value if the Air Force wishes to terminate for convenience.

(ASBCA 31875, 31876, R4, tab 9)

29. On 1 July 1985, Mr. Mang wrote to the Air Force that Rowe was "still awaiting Air Force direction on the change request submitted per Rowe's VECP-85-1 and acceptance of our change request per that VECP as identified

in Rowe letter of April 26, 1985." He also stated:

> These cables are 100% complete for both contracts and are ready for shipment. We are currently delinquent on contract 84-C-0053 by seven months with contract 84-C 1S76 coming due June 30, 1985. Since the change we requested is a product improvement we appreciate your expeditious handling of this change request and approval to shipment as soon as possible.

(ASBCA 31875, R4, tab 11) Rowe failed to make any deliveries under the contracts; and, in July 1985, the Air Force terminated the contracts for default (ASBCA 31875, 31876, R4, tab 2).

30. On 13 August 1985, Rowe forwarded to the Air Force termination for convenience claims under the two contracts (ASBCA 31875,

exh. A-12; ASBCA 31876, R4, tab 11); and on 5 September 1985, Mr. Telowicz responded as follows:

> 1. Reference your Termination for Convenience Claims forwarded by your letters of 13 Aug. 85.
>
> 2. You are advised that the two contracts were terminated for default and not for Termination for Convenience. Therefore, final decision on the terminations for convenience claims are not appropriate at this time.

(ASBCA 31875, 31876, R4, tab 12; see also ASBCA 31875, 31876, R4, tab 2, which contain the Air Force's original termination notices and pertinent modifications) These appeals followed.

DECISION[1]

We have repeatedly held that a default termination is a drastic sanction "which should be imposed (or sustained) only for good grounds and on solid evidence." J.D. Hedin Construction Co. v. United States, 187 Ct. Cl. 45, 57, 408 F.2d 424, 431 (1969). Moreover, it is axiomatic that the Government bears the burden of justifying its actions in terminating a contractor for default. See, e.p.., G.A. Karnavas Painting Co., ASBCA No. 19569, 76-1 BCA ¶11,837. In our view, the Government has met its burden in these appeals; and we, therefore, affirm the default terminations and deny Rowe's termination for convenience claims as moot.

---

[1]. On 30 December 1988, Rowe's counsel filed a motion to strike respondent's post-trial brief. He asserted that the Government's brief "is fully demonstrative of a total lack of care, candor and diligence because of the false assertions, violated representations and contradicted admissions that are rife throughout that document." We disagree with appellant's characterizations and deny its motion to strike the Government's brief.

Our decision is based upon the nature of the procurements themselves. We are not dealing with a situation where the Air Force was legally obligated to accept equivalent items. Parts contained in the B-52 were developed through an extensive testing program which resulted in the qualification of approved manufacturers and suppliers for specific part numbers. Since 1975 when it was originally qualified as the sole manufacturer of the bundles, Rowe had supplied the Air Force with parts insulated only by Okoflex; and when it ordered the specific part number for the bundles, the Air Force acted with the expectation that it would receive bundles which were the same as those which had been qualified and had been procured from Rowe for almost a decade.

By filing an engineering change proposal, Rowe's management implicitly recognized that they had altered the configuration of the bundles "after formal establishment of [their] configuration identification" (Finding 13). In addition, Rowe sought to place the burden of evaluating and approving the change on the Air Force and, in our view, was thereby attempting to shift the consequences of its actions on the Government. As we have found, there is no record evidence demonstrating that Rowe ascertained that Okoflex would be available prior to entering into its contracts with the Air Force; and it need not be stressed that if Rowe had learned of the unavailability of the insulating material prior to contract award, it could have communicated that fact to the Air Force and the parties could have resolved the problem. Hence, Rowe's dilemma is clearly one of its

own making. As we stated in B&H Construction Co., ASBCA Nos. 24558, 24587, 80-2 BCA ¶14,568:

A contractor has the responsibility to investigate sources of supply and delivery terms prior to submitting its bid. Jim O'Connor, Inc., ASBCA No. 22165, 78-1 BCA ¶13,160. And every reasonably prudent contractor prior to bidding should obtain assurance that the materials needed to complete the work in accordance with the contract terms will be furnished. Quality Controlled Stamping, Inc., ASBCA No. 19074, 74-2 BCA ¶10,670; Fidelity Construction Company, DOTCAB Nos. 75-19, 75-19A, 77-2 BCA ¶12,831 at 62,452; Bayou Culvert Mfg., Inc., AGBCA 400, 76-1 BCA ¶11,796.

Our conclusion in this regard is reinforced by the extensive testing which the Air Force would have been forced to undertake in order

to determine whether the proffered EPR insulation was equivalent to Okoflex. In fact, it is undisputed that the Air Force would have been required to duplicate the testing which Boeing had initially performed in order to qualify the part. Included among the litany of initial tests were altitude and flight testing. It is also undisputed that such testing would have necessitated the execution of another contract, the lapse of between three months to several years, and, of course, the expenditure of additional sums of money. It is difficult to take seriously Rowe's contentions that the Air Force assumed these obligations because of Rowe's own failure to ascertain its source of supply of Okoflex prior to contract award.

As a basis for its allegations, Rowe cites only one precedent as controlling. This was the Board's 25-year-old decision in B. F.

Goodrich Co., ASBCA No, 9100, 1964 BCA Para. 4202. There, we held that the Government had changed the underlying contract by requiring the contractor to provide internal supports for aircraft fuel cells which were originally designed and manufactured to comply with performance type specifications without the use of internal supports. Here, it was Rowe, not the Air Force, which was attempting to change the instant part number by altering both the dimensions and materials of the bundles after the qualification process was completed and the configuration was established. On this basis, we must conclude that Goodrich is distinguishable from these appeals.

CONCLUSION

The appeals are denied.

Dated: 28 July 1989

/s/Michael T. Paul
MICHAEL T. PAUL
Administrative Judge
Member of the Armed Services
Board of Contract Appeals

I concur

I concur

/s/William J. Ruberry
WILLIAM J. RUBERRY
Administrative Judge
Acting Chairman, Armed Services
Board of Contract Appeals

/s/Alan M. Spector
ALAN M. SPECTOR
Administrative Judge
Vice Chairman, Armed Services
Board of Contract Appeals

I certify that the foregoing is a true copy of the opinion and decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 31875, 31876, 33661, 33662, Appeals of Rowe Industries, Inc., rendered in conformance with the Board's Charter.

Dated: 31 Jul 1989

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-1113

ROWE INDUSTRIES, INC.,

Appellant,

v.

THE UNITED STATES

Appellee.

O R D E R

O R D E R

Before NIES, Chief Judge, COWEN, Senior Circuit Judge, and Brown, District Judge.

A petition for rehearing having been filed in this case, and a response thereto having been invited by the court and filed,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

District Judge Cowen votes to grant the rehearing.

The suggestion for rehearing in banc is under consideration.

The mandates will issue on December 4, 1990.

FOR THE COURT,

/S/ _____
Francis X. Gindhart
Clerk

Dated: November 27, 1990
cc: CHARLES E. RALEY
VENESSA P. SCIARRA

ROWE IND V. US, 90-1113
(BCA - 31875, 31876)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-1113

ROWE INDUSTRIES, INC.,

Appellant,

v.

THE UNITED STATES

Appellee.

O R D E R

O R D E R

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, declined.

FOR THE COURT,

/S/ _____
Francis X. Gindhart
Clerk

Dated: December 7, 1990

cc: CHARLES E. RALEY
VENESSA P. SCIARRA

ROWE IND V. US, 90-1113
(BCA - 31875, 31876)

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Rowe Industries, Inc.	)	ASBCA Nos.
	)	31875 31876
	)	33661 33662
Under Contract	)	
Nos. F34601-84-C-1576	)	
F34601-84-C-0053	)	

APPEARANCES FOR THE APPELLANT: Charles E. Raley, Esq.
James S. Phillips, Esq.
Israel & Raley
Washington, D.C.

APPEARANCES FOR THE GOVERNMENT: Colonel Robert L. Schaefer, USAF
Chief Trial Attorney
Gerald K. Fields, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PAUL ON APPELLANT'S MOTION FOR RECONSIDERATION AND FOR ARGUMENT BEFORE THE FULL DECIDING PANEL

Appellant Rowe Industries, Inc. (Rowe) has filed a motion for reconsideration of our decision dated 28 July 1989 in which we sustained default-terminations of its supply contracts by the Air Force. Although Rowe's motion is large in volume, it fails either to point to any newly discovered evidence or to

state any legal arguments which we had not considered in formulating our earlier opinion.

We have reviewed that opinion, as well as portions of the underlying evidentiary record, and, once again, conclude that Rowe is not entitled to any relief. Appellant's motion for oral argument before the full deciding panel is denied.

CONCLUSION

The motion for reconsideration is denied.

Dated: 16 November 1989

MICHAEL T. PAUL
Administrative Judge
Member of the Armed Services
Board of Contract Appeals

I concur

WILLIAM J. RUBERRY
Administrative Judge
Acting Chairman, Armed Services
Board of Contract Appeals

I concur

ALAN M. SPECTOR
Administrative Judge
Vice Chairman, Armed Services
Board of Contract Appeals

I certify that the foregoing is a true copy of the opinion and decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 31875, 31876, 33661 and 33662, Appeals of Rowe Industries, Inc., rendered in conformance with the Board's Charter.

Dated: 27 Nov 1989

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals

STATUTES AND REGULATIONS

I. ARMED SERVICES PROCUREMENT REGULATIONS --

18-618 Termination of Fixed-Price Construction Contracts for Default

* * *

18-618.4 Procedure in Case of Default

(a) The contracting officer shall consider the following factors in determining whether to terminate a contract for default:

(i) the provisions of the contract and applicable laws and regulations;

(ii) the specific failure of the contractor and excuses, if any, made by the contractor for such failure;

(iii) the period of time which would be required for the Government or another contractor to complete the work as compared to the time required for completion by the delinquent contractor;

(iv) the effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments; and

(v) any other pertinent facts and circumstances.

(b) If the contracting officer determines that the contractor's failure to perform arises

from causes which are excusable under the terms of the contract, the contracting officer shall not terminate the contractor's right to proceed, nor shall he charge the contractor with liquidated damages (or if no liquidated damages, then actual damages) because of any delays occasioned by such causes.

(c) If the contracting officer determines that the termination for default is in the best interest of the Government, he shall promptly send a written notice to the contractor terminating his right to proceed. The notice shall:

(i) set forth the contract number and date;

(ii) describe the act or omissions, and the extent of the resultant delay, constituting the default;

(iii) state that the contractor's right to proceed further with performance of the contract (or of a specified portion of the contract) is terminated;

(iv) state that the Government may cause the contract to be completed and that the contractor will be held liable for any increased costs;

(v) state that the Government reserves all rights and remedies provided by law or under the contract, in addition to charging increased costs;

(vi) state that the notice constitutes a decision (see 1-314), pursuant to the "Disputes" clause, that the contractor is in default as specified and that the contracting officer has determined that the delay is not excusable; and

(vii) state that the contractor has the right to appeal as specified in the "Disputes" clause.

(d) The same distribution shall be made of the termination notice as was made of the contract. A copy thereof shall also be furnished to the contractor's surety at the same time the notice is furnished to the contractor. The surety at the same time should be requested to advise if he desires to enter into any arrangement for completion of the work. In addition, the disbursing officer involved shall be notified to withhold further payments under the terminated contract pending further advice which should be furnished at the earliest practicable time.

(e) Promptly after issuance of the termination notice, the contracting officer shall determine the manner in which the work is to be completed and whether the materials, appliances, and plant which are on the site will be needed.

II. Federal Rules of Civil Procedure Rule 8(c):

Rule 8. General Rules of Pleading

* * *

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.